U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

H 24

FILE: [redacted] Office: CHICAGO, ILLINOIS Date:

IN RE: Applicant: [redacted]

APPLICATION: Application for Permission to Reapply for Admission after Removal into the United States after Deportation under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the District Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who entered the United States without inspection in 1992. On February 17, 1997, the applicant was apprehended during a traffic stop and he was subsequently removed from he United States on the same day. The record of proceedings reveals that the applicant reentered the United States on or about March 3, 1997, without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1326. The applicant married a U.S. citizen on March 21, 2001. He is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed on his behalf by his U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to remain in the United States and reside with U.S. citizen spouse and stepchildren.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See District Director's decision* dated March 18, 2004.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

. . . .

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception. – Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

On appeal, counsel submits a brief in which he states that the District Director failed to consider the significant favorable equities possessed by the applicant, he failed to consider the hardship to the applicant's family and erred in placing too much weight upon the negative factors in this case. Counsel states that the applicant's spouse has five U.S. citizen children, three of which live with the applicant and his spouse, and for whom he provides support and maintenance. Counsel states that the applicant's debarment from the United States would cause hardship to his family. In addition counsel states that the applicant has no criminal record,

is a hard working, consistent family man and is a law-abiding citizen who pays his taxes. He further states that the applicant has been living in the U.S. for almost 12 years, has established significant roots and has adjusted to the way of life in the United States. Furthermore counsel states that evidence submitted shows that separation of the family will cause extreme and unusual hardship to the applicant's family members. Finally counsel states that the District Director failed to give appropriate consideration to the positive equities which the applicant presented for consideration and placed too much weight upon the applicant's previous violation and his unauthorized employment.

Before the AAO can adjudicate the appeal and weigh the favorable versus and unfavorable factors in this case it must first determine if section 241(a)(5) of the Act applicable.

Section 241(a) states in pertinent part:

> (5) Reinstatement of removal orders against aliens illegally reentering. - If the Attorney General [Secretary] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The record of proceedings clearly reflects that the applicant was deported from the United States on February 17, 1997, and illegally reentered on March 3, 1997. The applicant's illegal reentry into the United States occurred prior to the April 1, 1997, enactment date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, ("IIRIRA"), Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009.

The issue of whether section 241(a)(5) provisions of the Act apply retroactively to illegal reentries made prior to April 1, 1997, has been the subject of conflicting decisions by the Circuit Courts.

The Ninth Circuit has held that Congress did not intend for section 241(a)(5) of the Act to be retroactive. The Sixth Circuit Court of Appeals has also held that section 241(a)(5) does not apply retroactively. The Fourth, Fifth and Eighth Circuit Courts of Appeals, on the other hand, have held that section 241(a)(5) of the Act is not retroactive if an alien can demonstrate that she or he had a reasonable expectation of relief prior to the enactment of the law.

It is noted that the applicant in the present case resides within the jurisdiction of the Seventh Circuit Court of Appeals. The Seventh Circuit has not ruled on the issue of section 241(a)(5)'s retroactivity. The applicant will therefore be bound by the AAO's determination regarding whether section 241(a)(5) applies retroactively to the applicant.

In *Alvarez-Portillo v. Ashcroft,* 280 F.3d 858 (8th Cir. 2002), the Eighth Circuit Court of Appeals discussed the varying conclusions reached by the Ninth, Sixth and Fourth Circuit Courts of Appeals regarding the retroactivity of section 241(a)(5) of the Act. The Eighth Circuit stated that it agreed with the Fourth Circuit, "that Congress by its silence has not unambiguously indicated either that § 241(a)(5) applies to all aliens or that it applies only to aliens that reentered the country after the statute's effective date." *Alvarez-Portillo* at 864.

The Court disagreed however, with the Fourth Circuit's determination that an alien who would have been eligible to adjust his status prior to the enactment of section 241(a)(5), had failed to establish that he had a reasonable expectation of relief from deportation.

The Eighth Circuit stated that:

> A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.

Alvarez-Portillo at 865

The Court held that, in general, "[n]o illegally reentering alien has a reasonable expectation that his prior deportation order will not be reinstated for purposes of effecting a second removal" and that "[i]llegally reentering aliens have no reasonable expectation that they will be entitled to collaterally attack their prior, final deportation orders in a subsequent removal proceeding." The Eighth Circuit additionally held that:

> In IIRIRA, Congress intended to reduce the delays incident to removing aliens who have illegally reentered. Illegal reentrants have no entitlement to such delays and no reasonable expectation that prior inefficiencies in the administration of our immigration laws would continue indefinitely. Thus, there is no impermissible retroactive effect when INS conducts reinstatement proceedings commenced after IIRIRA's enactment using the procedures adopted to implement § 241(a)(5). . . .

Id. at 865-866.

The Eighth Circuit found, however, that the petitioner in that case had married a United States citizen prior to the enactment of section 241(a)(5) of the Act, and that pursuant to a long-standing Service practice, "if the INS had commenced a deportation proceeding under [the] prior statutory regime for illegal reentry, his marriage would have made him a likely candidate for adjustment of status to [a] lawful permanent resident". *Id.* at 862. The Court stated that, as a result:

> [U]nder prior law, [redacted] had a reasonable expectation he could either file for a discretionary adjustment of status, or wait and seek the adjustment as a defense to a later deportation proceeding. He chose to wait, and § 241(a)(5) as applied by the INS has now deprived him of that defense. To this extent, we conclude the statute has an impermissible retroactive effect on his reinstatement and removal proceeding. *Id.* at 867.

In *Ojeda-Terrazas v. Ashcroft,* 290 F.3d 292 (5th Cir. 2002), the Fifth Circuit Court of Appeals held that "Congress did not clearly indicate whether it intended to apply § 241(a)(5) retroactively" and that section 241(a)(5) of the Act did not have an impermissible retroactive effect as applied to the petitioner in that case. *See Ojeda-Terrazas* at 299.

Using reasoning similar to that set forth in the Eighth Circuit case, *Alvarez-Portillo, supra,* the Fifth Circuit stated that in most cases an illegal reentrant has "no reasonable expectation of having a hearing before an immigration judge rather than an INS official when he illegally reentered the United States (prior to the enactment of section 241(a)(5)), and that in general, section 241(a)(5) "does not deal with any vested rights or settled expectations arising out of the alien's wrongdoing. *See Ojeda-Terrazas* at 301-302 (citations omitted).

Based on a reading of the above cases, the AAO finds that as a general matter, illegal reentrants have no reasonable expectation of deportation relief. The AAO also finds, however, that section 241(a)(5) will not apply retroactively to an alien who illegally reentered the U.S. prior to the April 1, 1997, enactment of section 241(a)(5) of the Act **if** the alien establishes that she or he had a reasonable expectation of relief from deportation prior to the enactment of section 241(a)(5) of the Act. Absent a reasonable expectation of relief, section 241(a)(5) of the Act will be applied retroactively to an alien.

The applicant in this case has failed to establish that he had a reasonable expectation of relief from deportation at the time of his illegal reentry into the U.S. or prior to April 1, 1997. At the time of his March 3, 1997, reentry into the U.S. the applicant had no reasonable expectation that he would be able to collaterally attack his prior final deportation order or that he was entitled to the prior procedural inefficiencies in the administration of immigration laws. *See Alvarez-Portillo* at 865-66. Moreover, the applicant did not marry a U.S. citizen until March 21, 2001, several years after the enactment of section 241(a)(5) of the Act. The applicant therefore had no reasonable expectation of adjustment of status relief under pre-IIRIRA laws. *See id.* at 867. Thus, as applied to the applicant, section 241(a)(5) of the Act does not impose any new duties or new liabilities. The section will therefore be applied to him retroactively.

In *Matter of Martinez-Torres,* 10 I&N Dec. 776 (BIA 1964), the BIA held that in the case of an applicant who is mandatorily inadmissible to the U.S. "no purpose would be served in granting [the] application for permission to reapply for admission into the United States." The BIA held further that the district director's action in denying an I-212 application as a matter of administrative discretion was proper.

The record in this case reflects that the applicant reentered the U.S. illegally after having been deported and that he is subject to section 241(a)(5) reinstatement of his deportation order. He is thus ineligible for adjustment of status or any other relief under the Act. As such, no purpose would be served in granting permission to reapply for admission. Accordingly, the applicant's appeal will be dismissed.

ORDER: The appeal is dismissed.